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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. 363

WILLIAM C. BRICKEY, JR. ..... *Petitioner*

vs.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDICES

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PARAGON PRINTING CO., LITTLE ROCK

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The petitioner, William C. Brickey, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed his conviction of mail fraud and sentence to four years imprisonment.

CITATIONS TO OPINIONS BELOW

The Chief Judge of the United States District Court for the Eastern District of Arkansas, who presided at the trial of the petitioner, had occasion to issue a memorandum opinion concerning the selection and composition of the grand jury which returned the indictment. That opinion

is unreported, but has been copied at Appendix B, *infra* beginning on page 33. Since the opinion of the Court of Appeals has not yet been reported, it also appears in Appendix B, *infra* beginning on page 16.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1970 (CA R. 17); Appendix B, page 32 *infra*. A petition for rehearing was timely filed, but was denied on May 25, 1970 (CA R. 23). A motion for stay of mandate pending this application for writ of certiorari was presented to the Court of Appeals and was granted on June 3, 1970 (CA R. 24). The time in which to file this petition for writ of certiorari was enlarged to July 6, 1970, by order of Mr. Justice Blackmun.

QUESTIONS PRESENTED

1. Was the acquisition of a virtual blue ribbon grand jury by use of the key man system without any guides or standards sufficient to make a *prima facie* showing of unconstitutional jury selection?

2. Whether the calling of the witness Blosser, shown to have been involved with petitioner, by the United States Attorney, who with the trial judge, had advanced knowledge that the witness would invoke the privilege of the Fifth Amendment, so prejudiced the petitioner as to prevent a fair trial?

3. Was the Mail Fraud Statute, 18 U.S.C. §1341, applicable where, as in this case, the mailings were remote,

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[1] The trial transcript and the pertinent documents of the Court of Appeals have been filed. Reference will be made to the Court of Appeals' record by "CA R. " The trial record is designated "Vol. R. " and the supplemental record which consists of the hearing on the grand jury, as "Sup. R. "

unanticipated, and uninvolved in the execution of the purported scheme?

4. Was the frequent testimony by several government witnesses directed to certain private expenditures of petitioner having no relationship to the charges involved, such as to taint the trial atmosphere by dramatizing immaterial and prejudical matters?

5. Was the failure of the Court of Appeals to have before it and view certain chart exhibits, which were used in the trial by the Government and challenged by petitioner, a denial of appellate review?

STATUTE INVOLVED

One aspect of this petition for a writ of certiorari involves the application of the Mail Fraud Statute, 18 U.S.C. 1341, which is copied at Appendix A, *infra*, page

STATEMENT

The petitioner was indicted in the Eastern District of Arkansas for alleged violations of the Mail Fraud Statute. The evidence at trial disclosed that early in 1963, the petitioner and others became interested in Republic Casualty Insurance Company, an Arkansas corporation, while it was in conservatorship under the supervision of the Arkansas Insurance Commissioner (Vol. 2 R. 168-175). Under an arrangement, which was approved by the Commissioner, the petitioner became President of Republic Casualty although the company remained in a conditional status (Vol. 3 R. 491-497). With additional financial assistance provided by petitioner and his associates, Republic's position substantially improved for a period of time. However, because of losses incurred in substandard and high risk business, investment reversals and over extension of capital through a desire for rapid growth, the Insurance Commissioner moved to declare Republic Casualty to be insolvent in a state court proceeding (Vol. 1 R. 13, 34-36). Subsequently, the petitioner was charged with twenty-four violations of mail fraud.

Timely motions were filed attacking the composition and selection of the grand jury and the indictment itself. After a hearing, the motions were denied with the exception that all but the first two counts of the indictment were dismissed.

The hearing regarding the selection of the grand jury panel disclosed that the jury commissioner was a retired vice president and treasurer of a clothing manufacturing firm. He testified in substance that he lived in the area

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The indictment was filed on September 11, 1968. No state criminal action was ever taken against petitioner.

of the Little Rock Country Club and contacted his business and social acquaintances for jury duty (Supp. R. 9-14). The acting Clerk of the District Court testified that she recalled writing to a minister and Enoch Fisher, a retired janitor at the Post Office and Courthouse Building. As it developed, Mr. Fisher placed his own name on the list of available jurors and, coincidently, was the only Negro and laborer who served on the grand jury (Supp. R. 27-30). The most disturbing fact was that no standards, guides or source of information for persons eligible for jury service were employed by the officials responsible for the selection of the grand jury panel (Supp. R. 16-18; 18-22).

During the course of the Government's case in chief, numerous witnesses made reference to Frank A. Blosser as being involved with a bank in Colorado and another in the Bahamas where Republic Casualty had obtained certificates of deposit, and who was closely associated with the petitioner in various transactions. On the third day of the trial, the United States Attorney called Blosser, who had been present with his attorney, as a witness. At that time petitioner's trial counsel approached the bench and advised the trial judge that since the witness intended to plead the Fifth Amendment the matter should first be considered in chambers (Vol. 3 R. 368). This request was ignored and the witness was ordered to take the stand (Vol. 3 R. 368). The fourth question asked Blosser was if he had ever been connected with a bank in Colorado. The witness replied that on the advice of counsel he refused to answer because it might tend to incriminate him. The petitioner's trial attorney promptly moved for a mistrial. On further inquiry, the trial judge adjourned to chambers and found the claim of privilege to be well founded. On return to open court, the entire matter was reviewed and the jury admonished not to consider it. (Vol. 3 R. 372-373). However, the United States Attorney was not content to let the

incident rest for throughout the balance of the trial witnesses made frequent references to Blosser and his activities and how they were connected to the petitioner. (Vol. 3 R. 415, 421, 423, 431, 434, 436, 437, etc., and testimony of Frank Goldy, Vol. 4 R. 640-645).

The Government's contention, which was accepted by the lower courts, was that the collection of two checks through banking channels was an essential part of the total scheme to defraud perpetrated by petitioner. The petitioner insists that the Mail Fraud Statute is not applicable as a matter of law. The mailing described in Count II involved a check left with a business associate, Leonhart & Company, with other collateral to secure a loan (Vol. 4 R. 546-548). The later repayment of the loan had nothing whatever to do with the charge in the indictment. Count I involved a check delivered to petitioner's attorney, Raymond Shaheen (Vol. 4 R. 532-544). This check with another was exchanged for a cashier's check and used to purchase stock in United Benefit Fire Insurance Company (Vol. 4 R. 538-539). Although the checks identified in Counts I and II were ultimately sent through the mail for collection, the mailings could not, under the circumstances, have been even an incidental part of the purported scheme.

It should be fair to state that at least a majority of the witnesses and most of the Government's evidence was not directed at either the mailings or the fraudulent scheme attributed to petitioner. Rather, emphasis was placed on how the petitioner spent the money once it had found its way into General Leasing, a company conceded to be wholly owned by petitioner. The petitioner through his attorney admitted several times during the course of the trial that money received by General Leasing was, for all purposes, the same as if received by the petitioner personally (Vol. 2 R. 152-153; Vol. 5 R. 699-700). Yet, wit-

ness after witness testified regarding purchases made by petitioner through General Leasing. Reference was made to a diamond ring bought for the petitioner's wife (Vol. 4 R. 613-621), a swimming pool constructed at his home (Vol. 4 R. 632-634), mortgage payments on his home (Vol. 4 R. 627-631), maintenance at his home and the like (Vol. 5 R. 701, 710-711). Time and time again objection was raised to this category of evidence on the basis that it served no purpose except to prejudice the jury (Vol. 4 R. 614, 615, 617, 618 and 621). But the trial judge continued to admit this type of evidence although cautioning the jury as to its limited use.

Finally, to dramatize the foregoing evidence, the last government witness, Willie Hodges, prepared and referred to five charts during his testimony. However, because it was believed that the exhibits were not technically introduced into evidence, they were unknown to petitioner, omitted from the trial record. The Court of Appeals was under the mistaken belief that the charts were not in evidence. Hence, the court below did not deem it necessary to view any of the charts before affirming the appeal. The trial record however, confirms that these charts were marked as exhibits and received in evidence (Vol. 5 R. 745-747).

As it must, this is but a very brief resume of the facts involved in the five issues that petitioner believes to be of such significance as to warrant review and consideration by this Court.

REASONS FOR GRANTING THE WRIT

1. This record discloses a classic example of the use of the recently condemned key man system of selecting jury panels and all of the evils attendant to it. The fact that

this may be the last case dealing with the improper use of the key man method should not make it less important. To the contrary, this case is more significant as the final vestage of a by-gone era.[1]

As noted earlier, the evidence taken at the pretrial hearing confirmed that there was not even a pretense of using any "standards" or "sources" to assure securing a representative cross section of persons eligible for jury service in the district. In this regard, this decision is in obvious conflict with *Rabinowitz* v. *United States*, 366 F.2d 34 (5 Cir. 1966). Indeed, the holding of the lower court seems contrary to its earlier ruling in *Housley* v. *Stewart*, 311 F.2d 691 (8 Cir. 1963).

There is truly an affirmative duty on the jury selection officials to satisfy the laws and the Constitution. *Mobley* v. *United States*, 379 F.2d 768 (5 Cir. 1967).

The district judge ruled that a *prima facie* case had not been made because there was no showing that the panel had been improperly drawn. See Memorandum Opinion, Appendix B. In so doing, the trial judge was required to ignore the blue ribbon qualities in the composition of the grand jury.[2]

It is submitted that the petitioner discharged his burden of proof once the jury list was introduced and it was proven that the jury selection officials failed to make any effort to know the potentially qualified persons within the significant elements in the district.

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[1] The Jury Selection and Service Act of 1968 went into effect on December 23, 1968. 82 Stat. 54, 28 U.S.C. §1863 (Supp. IV, 1969).

[2] See Appendix C, a newspaper clipping stipulated to be correct, listing jurors, their ages, occupations and hometowns.

2. Perhaps the most shocking event of the entire trial occurred on the third day when the Government called Frank Blosser as a witness (Vol. 3 R. 367-368). Mr. Blosser had been subpoenaed and appeared at trial with his private attorney. When the witness was named, petitioner's trial counsel approached the bench and advised the judge that the witness intended to invoke the privilege of the Fifth Amendment and, in so doing, the jury would draw inferences which would prejudice the petitioner. It was requested that the matter be explored in chambers to determine if the claim of incrimination was well founded. Further, it was disclosed that the United States Attorney had been informed of the intention of the witness on three previous occasions.

The request was ignored and Blosser was ordered to take the witness stand (Vol. 3 R. 368). The fourth question asked was if the witness had ever been connected with a bank in Colorado, to which the witness stated that he would not answer because it might incriminate him. Undaunted, the trial judge asked the witness if he honestly thought the answer would incriminate him (Vol. 3 R. 369). The witness replied that he did on advise of his attorney. It was only then the trial judge belatedly recognized the genuine necessity of considering the matter in chambers. In short, the claim of Blosser was determined to be proper. Upon returning to the courtroom, the trial judge re-emphasized Blosser's association with the Home Industrial Bank and admonished the jury concerning the incident (Vol. 3 R. 372-373).

The worst, of course, had been accomplished. It is doubted that the witness could have testified to anything that would have been more damaging than invoking the Fifth Amendment.

The Court of Appeals rejected the petitioner's complaint of prejudicial error relying primarily on the decision of this Court in *Namet* v. *United States*, 373 U.S. 179, 185 (1963). The decision of the lower court concluded that there were no inferences, the incident was minor and, moreover, the jury was instructed to disregard it.

The alternatives, according to the Court of Appeals were to excuse the witness or delay the trial by an *in camera* proceeding. It is submitted that the brief delay occasioned by an in chambers inquiry far outweighs the great probability of prejudice.

The fact is that the Government had, prior to the calling of Blosser, made a strong connection between two distant banks doing business with petitioner. If the matter had been left alone the ruling of the court below would be more palatable, but the United States Attorney capitalized on the incident and prohibited it from straying far from the minds of the jurors by frequent references. For example, these later witnesses answered questions regarding Blosser and the banks: Shull, Vol. 3 R. 415-416; Trimble, Vol. 3 R. 419, 421, 423, etc.; Goldy, Vol. 4 R. 640-645; and Hodges, Vol. 5 R. 681-682, 684, 690, 719, 766, 775, and 776. This hardly could be described as minor lapses through a trial, when references occurred during each of the remaining two trial days.

The facts in this case fall within the two exceptions noted in *Namet* v. *United States*, *supra*. Whether purposely or not, the Government built a substantial part of its case by the numerous references to Blosser and his banks. There is no doubt of the tremendous weight added to the prosecution's case. Curiously, the United States Attorney was at a loss to disclose why Blosser was called and what might be proven by him. Even in the Court of

Appeals no explanation was provided by the Government. Finally, the refusal of the witness to testify before the jury emphasized the fact that the petitioner did not testify in his own behalf.

Certiorari should be granted to define in detail the obligation of the Government and the trial judge in situations such as this. The decision of *Namet v. United States* must be clarified if it is to be applied properly in the trial courts and still permit the Fifth Amendment to afford the protection for which it was designed.

3. This case is important because it exceeds the limits and purposes of the Mail Fraud Statute.

The factual circumstances disclosed in this record are almost identical to those recited in *Kann v. United States*, 323 U.S. 88 (1944). If the limit of mail fraud prosecutions is to be recognized at all, certiorari should be granted in this instance so that a better definition may be drawn, cf. *Parr, et al v. United States*, 363 U.S. 370 (1960).

4. As noted earlier, the great bulk of the Government's case was not devoted to the fact of mailing or even the scheme to defraud. Rather, the prosecution dwelled on the personal expenditures made by petitioner once the money reached his control. Witnesses made repeated references to the purchase of a diamond ring for petitioner's wife, construction of a swimming pool at his home, mortgage payments, personal use of an airplane and business credit cards, yard work at his residence and the like.

This testimony served no useful purpose except to inflame the jurors and prejudice them against the petitioner. As stated, the petitioner admitted that funds received by his corporation, General Leasing, was the same as him personally having the money (See comment of trial judge Vol.

5 R. 699-700). Hence, the fraud was completed at that juncture and it was not essential for the Government to prove how the petitioner spent the money.

As presented, this case is remarkable similar to *Blumberg* v. *United States*, 222 F.2d 496 (5 Cir. 1966) where in a tax evasion case, the prosecution presented evidence of a large sum of money spent on the wedding of the defendant's daughter. In *South* v. *United States*, 368 F.2d 202 (5 Cir. 1966) it was held that in the trial of a mail fraud case, that the introduction of the defendant's income tax return was prejudicial.

If only a single incident had occurred, the damage may not have been so great, but it is apparent that the prosecution used the evidence to convict the petitioner on collateral matters.

5. One of the issues urged by petitioner for reversal was the use and contents of certain charts which had been prepared and used by the Government witness Willie O. Hodges (Vol. 5 R. 671a). At the time of the oral argument before the Court of Appeals, it was discovered that these particular charts did not accompany the record. Apparently the Clerk of the District Court had failed to include the charts with the other exhibits.

It was not until the opinion of the court below was published that petitioner learned that the charts had never been delivered to the Court of Appeals. The decision of that Court recited that the charts were not in evidence and, therefore, it was held unnecessary that the charts be viewed.

It is submitted that the charts in question were marked as exhibits and received in evidence by action of the trial judge (Vol. 5 R. 745-747). Certainly, it was obligatory of the Court of Appeals to have before it such portions of the

record as were necessary to consider the contentions of petitioner before his conviction was affirmed. To omit or ignore any pertinent portion of the trial record has the effect of prohibiting the petitioner's statutory right of appellate review.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July 1, 1970

APPENDIX A

MAIL FRAUD

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
No. 19,714

United States of America, Appellees,	Appeal from the United States District Court for the Eastern District of Arkansas.
William C. Brickey, Jr., Appellant.	

[April 24, 1970.]

Before MATTHES, GIBSON and LAY, Circuit Judges.
GIBSON, Circuit Judge.

The defendant William C. Brickey, Jr., was indicted in the Eastern District of Arkansas on 24 counts of mail fraud in violation of 18 U.S.C. § 1341 and was convicted in a jury trial on two of the counts.[1] He was sentenced to a 4-year term of imprisonment. A timely appeal was filed in which Brickey raises a number of issues, including the selection of the grand jury, the sufficiency of the evidence, the applicability of the mail fraud statute and evidentiary issues, all of which will be discussed seriatim. We affirm the conviction.

The indictment charged that Brickey, while president and chairman of the board of the Republic Casualty Insurance Company (an Arkansas corporation), devised a scheme to defraud that company and its stockholders, policyholders and general creditors by falsely representing that the company was solvent and by diverting company

[1] The remaining counts were dismissed prior to trial by the court on a pretrial motion filed by defendant.

funds to his personal use. A number of overt acts were listed in the indictment setting forth the fraud.

In addition to proving numerous misrepresentations by Brickey as to Republic's solvency, the record establishes that Brickey caused two separate checks to be sent through the mail in carrying out his scheme to divert funds of Republic to his personal benefit. One check for $75,000 was drawn upon Republic's account by Brickey and utilized by Brickey's agent and attorney to purchase a cashier's check from the Central National Bank of Chicago, Illinois, the check on Republic being sent through the mail to the Worthen Bank & Trust Company of Little Rock, Arkansas. The second check, which was for $35,000, was drawn on Republic by Brickey to repay a personal loan of Brickey's that he had secured for the purpose of completing payment on his personal purchase of the controlling stock of United Benefit Fire Insurance Company. This check was deposited by the drawee Leonhart & Company in the Mercantile Safe Deposit & Trust Company of Baltimore, Maryland, and was sent by mail for collection to the Worthen Bank & Trust Company of Little Rock, Arkansas.

The completion of the above two acts of issuing and causing to be cleared checks amounting to $110,000 on Republic's account completed an obvious fraud on Republic, its stockholders and policyholders. This is not denied by Brickey. He contends, however, that his acts amount only to common law fraud and that no federal violation has occurred.

SELECTION OF GRAND JURY

Brickey challenged the composition of the grand jury by filing a Motion to Dismiss the Indictment[2] on the ground that the key man system was used in compiling the grand jury list. He contends the key man system is per se unconstitutional or at least the use of the key man system makes a prima facie case for an unconstitutional selection, thereby placing the burden on the Government of proving its use is constitutionally permissible.

The only proof submitted by Brickey in support of his contention was a newspaper list of the grand jurors' names, addresses and occupations and an unsupported affidavit which the trial court found to be false. No attempt was made to attack the entire jury list from which the particular grand jury was selected. The District Court after full hearing on the motion held that the defendant had produced no evidence of impropriety on the part of the officials concerned in the selections for the grand jury list and had not shown that the system failed to obtain a fair cross-section of the district.

The Constitution requires jury selection systems to draw their jurors from a fair cross-section of the community. *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 220 (1946). This does not mean that every class or subclass or identifiable group must be represented on every jury list but does mean there must not be any systematic, intentional or negligent exclusion of persons or groups. *Hausen* v. *United States*, 393 F.2d 763, 766-67 (8th Cir.), *cert. denied*, 393 U.S. 833 (1968); *Bailey* v. *Henslee*, 287

[2]The indictment was returned on September 11, 1968, approximately three and one-half months before the Jury Selection and Service Act of 1968 went into effect on December 23, 1968. 82 Stat. 54, 28 U.S.C. § 1863 (Supp. IV, 1969).

F.2d 936, 942 (8th Cir. 1961). The constitutional requirement of an impartial jury is met if there is no discrimination in the selection of names for the jury list. Many methods of jury selection have been used and approved by the courts where no intentional or systematic discrimination has been proved, and the burden of proving intentional and purposeful discrimination rests on the defendant. *Hausen v. United States*, *supra* at 768; *Turner v. Fouche*, 396 U.S. 346 (Jan. 19, 1970). The key man system is not improper per se. *Pope v. United States*, 372 F.2d 710, 723 (8th Cir. 1967), *vacated on other grounds*, 392 U.S. 651 (1968); *Moldez v. United States*, 379 F.2d 768, 773 (5th Cir. 1967); *Sanders v. United States*, 415 F.2d 621, 623 (5th Cir. 1969); *United States v. DiTommaso*, 405 F.2d 385, 390 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); *United States v. Hoffa*, 349 F.2d 20, 29-30 (6th Cir. 1965).

We find that the District Court properly overruled the motion to dismiss as the defendant had not made out a prima facie case of intentional or negligent discrimination in the selection of the grand jury. No evidence was adduced and no showing was made with respect to the composition of the jury list from which the grand jurors were drawn and no showing was made that the officials selecting the jurors used improper standards or inadequate sources. No discrimination whatsoever has been shown in compiling the grand jury list. In addition, a scanning of the grand jury itself shows the jurors to be a representative cross-section of occupations from different social classifications residing in the district.

SUFFICIENCY OF THE EVIDENCE

The elements of the offense of mail fraud under 18 U.S.C. §1341 are "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the

scheme." *Pereira v. United States*, 347 U.S. 1, 8 (1954). In the instant case, Brickey concedes that the Government has established his scheme to defraud. However, Brickey does raise two contentions concerning the second Element of the offense, the mailing. First, it is argued that Brickey neither mailed anything himself nor caused anything to be mailed with regard to the fraudulent transactions. Second, assuming arguendo that Brickey is deemed to have caused the mailing of the two checks by the Chicago and Baltimore banks to the Worthen Bank of Little Rock, Arkansas, Brickey contends the mail fraud statute is not applicable because these mailings were not "incident to an essential part of the scheme."

Raymond Shaheen was employed as an attorney by Brickey for the express purpose of purchasing some 92,000 shares of stock (a controlling interest) in the United Benefit Fire Insurance Company of Omaha, Nebraska. Shaheen as attorney and agent for Brickey obtained from the Central National Bank of Chicago, Illinois, cashier's checks for $75,000 and $35,000, which were then used to purchase the stock of United Benefit for Brickey.

The $75,000 cashier's check was purchased with a $75,000 check drawn on Republic Casualty's account at the Worthen Bank of Little Rock, Arkansas, by Brickey and endorsed by Brickey and Shaheen. The $75,000 check drawn on Republic was sent through the mail for collection from the Chicago bank to the Worthen Bank of Little Rock and subsequently paid.

The $35,000 cashier's check was purchased by Shaheen with $35,000 loaned Brickey by Harold Leonhart & Company. At the time Brickey borrowed the money, he assigned an oil well as collateral and gave his personal note to Harold Leonhart & Company and drew a $35,000 check

on the Republic Casualty account at the Worthen Bank of Little Rock payable to the order of Harold Leonhart & Company. Although Brickey's check was not postdated, Leonhart and Brickey apparently had a mutual understanding that Leonhart would not cash this check for approximately a month. Four weeks later Leonhart deposited Brickey's check for collection with the Mercantile Safe Deposit & Trust Company of Baltimore, Maryland, and it was in turn sent through the mail for collection to the Worthen Bank of Little Rock, Arkansas, which paid the check 21 days later.

Proof of the mailing of the two checks in question was furnished by Frank J. Descoteau, manager of the Proof and Transit Department of the Worthen Bank of Little Rock, who testified that the only way the checks signed by Brickey could have moved from the Central National Bank in Chicago to the Worthen Bank and from the Mercantile Bank in Baltimore to the Worthen Bank was through the mail. When it is the unvaried custom of a bank to use the mail for certain transactions, proof of this custom is sufficient to submit the question of mailing to the jury. *United States* v. *Doran*, 299 F.2d 511, 514 (7th Cir.), *cert. denied*, 370 U.S. 925 (1962); *Decker* v. *United States*, 140 F.2d 378, 379 (4th Cir.), *cert. denied*, 321 U.S. 792 (1944).

To establish the mailing element of the offense of mail fraud it is not necessary to show that the defendant mailed anything himself, it is sufficient to show that he caused the mailing. 18 U.S.C. §2(b). "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended then he 'causes' the mails to be used." *Pereira* v. *United States*, *supra* at 8-9.

Obviously Brickey, acting through his attorney and agent Shaheen, caused the mailing of Brickey's $75,000 check drawn on Republic Casualty when he and Shaheen endorsed the check to the Central National Bank of Chicago for collection at the Worthen Bank of Little Rock. It is also clear that Brickey's $35,000 check was utilized to expedite collection of Leonhart's loan and was not given as collateral, therefore, Brickey can be deemed to have caused its mailing since he could reasonably foresee when he drew the check that use of the mail would follow in the ordinary course of the collection process as the drawee's locale was Baltimore, Maryland. We think the proof of mailing and the causing to be mailed of these two checks is more than adequate, and the evidence fully supports the verdict.

The Government used the testimony of Brickey's attorney Shaheen to show that Brickey caused the mailing of the $75,000 check and Brickey maintains this violated his attorney-client privilege. We recognize the confidential communication privilege of attorney and client, *Love* v. *United States*, 386 F.2d 260, 265 (8th Cir. 1967), *cert. denied*, 390 U.S. 985 (1968), but no confidential communication was violated in this case. Acts or services done by an attorney for his client in the course of his employment do not come within the privilege because no private professional communication is entailed. *Behrens* v. *Hironimus*, 170 F.2d 627, 628 (4th Cir. 1948); *United States* v. *Papé*, 144 F.2d 778, 782 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944); *United States* v. *De Vasto*, 52 F.2d 26, 30 (2d Cir.), *cert. denied*, 284 U.S. 678 (1931).

Shaheen's testimony did not reveal any confidential information or advice derived from the professional relationship but simply the actual fact of his employment and the fact that he did certain acts in Brickey's behalf in pur-

chasing the stock of United Benefit. This testimony was not within the ambit of the attorney-client privilege and was properly admitted by the trial court.

APPLICABILITY OF THE MAIL FRAUD STATUTE, 18 U.S.C. §1341

Contrary to the contention of the defendant the mailing of the checks in question was essential to the fraudulent scheme devised by Brickey to divert assets of Republic Casualty to his personal use. As stated by the Supreme Court in *Pereira* v. *United States*:

> "Collecting the proceeds of the check was an essential part of that scheme. For this purpose, [the defendant] delivered the check drawn on a Los Angeles bank to the El Paso bank. There was substantial evidence to show that the check was mailed from Texas to California, in the ordinary course of business.
>
> "... It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States* v. *Young*, 232 U.S. 155. Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established." At 8 of 347 U.S.

As previously discussed, each of these checks had to clear through the Worthen Bank of Little Rock in order for Brickey to successfully complete his fraudulent scheme, and the use of the mails was an essential act in processing the checks for clearing or collection.

The basic elements necessary to show a mail fraud violation of 18 U.S.C. §1341 were proved in this case.

ADMISSIBILITY OF EVIDENCE ON BRICKEY'S PERSONAL EXPENDITURES

Brickey utilized the General Leasing Corporation, which he wholly owned, to extract money from Republic Casualty, which monies were expended for Brickey's personal benefit. Brickey admitted that General Leasing was his company and concedes a diversion of Republic Casualty's funds but claims that evidence of the actual expenditures for his personal benefit was irrelevant and was offered for the sole purpose of inflaming the jury and creating prejudice against him.

The evidence showed that General Leasing paid for Brickey's purchase of a $9,500 diamond ring, a $4,250 swimming pool and for certain payments made on the purchase of Brickey's residence. The trial court admitted the evidence over objection, ruling that the Government was entitled to show that Republic Casualty's money was fraudulently diverted through General Leasing to Brickey in carrying out Brickey's scheme to defraud. The trial court cautioned the jury that it was no concern of the jury what Brickey bought with the money he expended for his personal use, and the evidence of these purchases should be considered only as "showing where Republic money went after it went to General Leasing Corporation, if it did go there."

Brickey relies heavily on *Blumberg* v. *United States*, 222 F. 2d 496 (5th Cir. 1955), where the defendant charged with willful attempt to evade federal income taxes defended on the ground that the omissions in the reporting of his income were oversights. The court concluded that evidence of expenditures made by the defendant for an expensive wedding party for his daughter was irrelevant

on the issue of whether the defendant's failure to report was intentional and the admission of this evidence was prejudicial in that, since no instruction was given, the jury was "bound to have thought that this money was additional income which had been concealed and not reported." *Id.* at 500.

Blumberg is not applicable to the testimony in the case at bar with regard to Brickey's personal expenditures for this evidence directly proved the fraudulent scheme to siphon off Republic funds through General Leasing to Brickey. The Government was not required to accept a judicial admission (assuming Brickey's stipulation would amount to a judicial admission) of the defendant but had a right to offer proof on the point admitted. *United States* v. *Mishkin*, 317 F.2d 634, 638 (2d Cir. 1963); *Parr* v. *United States*, 255 F.2d 86, 88 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958). As stated in *Parr* at 88:

> "It is a general rule that 'A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.' 31 C.J.S. Evidence §299, p. 1068. The reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.'"

See also Alire v. *United States*, 313 F.2d 31, 34-35 (10th Cir. 1962), *cert. denied*, 373 U.S. 943 (1963). The trial court did not abuse its discretion in admitting this testimony and properly limited the scope of the relevancy of the testimony by its cautionary admonition to the jury on the use the jury may make of such evidence.

THE USE OF CHARTS AND TESTIMONY RELATING TO PERSONAL EXPENDITURES OF THE DEFENDANT

The Government in presenting its case called as a witness Willie O. Hodges, a C.P.A. for the Internal Audit Division of the Bureau of Chief Postal Inspector, who testified as to the validity of Republic's financial statements, the fact of Republic's insolvency, and Brickey's personal use of Republic's funds. To illustrate his testimony Hodges used five charts, but these were not introduced into evidence.

Defendant argues that these charts were prejudicial in that Hodges failed to include certain transactions and to list certain sums on these charts. It is also contended that Hodges' description of one of Republic's cash transactions as check kiting was highly prejudicial to the defendant despite the cautionary instruction of the trial judge.

The Government views Hodges' testimony as relevant because it bore on the specific indictment charges that defendant obtained money from Republic for his own personal expenses. As to Hodges' usage of the charts, the Government points out that defendant made only one minor objection to the form or content of any of the five charts, which objection was sustained, and, therefore, the defendant waived any other error with regard to usage of the charts.

Since the challenged charts were not introduced into evidence we have not actually observed them. However, the failure of defendant's counsel to object and make the charts part of the record waives the alleged errors for a party cannot complain of an error acquiesced in by him.

United States v. *Richman*, 369 F.2d 465, 467-68 (7th Cir. 1966); *Lake City, Nettleton & Bay Rd. Imp. Dist. No. 1* v. *Lucherman*, 113 F.2d 458, 469 (8th Cir. 1940). Furthermore, the usage and admission of charts is largely within the discretion of the trial court and its action in permitting the usage of charts will not be reversed unless this discretion has been abused. *Koolish* v. *United States*, 340 F.2d 513, 533 (8th Cir. 1965). Since the court admonished the jury that the charts were not in evidence but were to be considered only as illustrative of Hodges' testimony and sustained the defendant's one minor objection, we find that there was no abuse of the court's discretion in permitting the usage of the five charts.

Hodges in testifying referred to a condition of check kiting in reviewing Republic's balance sheet of December 31, 1964. This reference was in the context of answering why he had discounted the cash reported on Republic's balance sheet dated December 31, 1964. Hodges testified that it was normal auditing procedure to examine deposits just prior to the statement date and to compare disbursements immediately after the statement date to determine whether funds that were deposited prior to the statement date were disbursed immediately thereafter. Hodges then said that Brickey had used this check kiting procedure to misrepresent Republic's cash account as of December 31, 1964 by $52,769.82. The defendant's objection to Hodges' characterization of check kiting was overruled, but the court did give a cautionary instruction that the jury could not convict the defendant of check kiting and that the evidence was admissible only in explaining the financial status of Republic on December 31, 1964. On appeal, the defendant argues that Hodges' check kiting testimony was reversible error as bearing upon a separate and unrelated offense.

Check kiting is a criminal offense under the Arkansas Hot Check Law. Ark. Stat. Ann. §§67-719 to 724 (1966 Replace). We think, however, that the evidence tending to prove check kiting was admissible because it was relevant to the general indictment charge that Brickey filed a false financial statement for the year ending December 31, 1964, with the Arkansas Insurance Commissioner. "Relevant evidence which tends to prove a material fact in the case on trial is admissible even though it incidentally shows that the accused committed another offense at a different time and place." *Fernandez v. United States*, 329 F.2d 899, 908 (9th Cir.), *cert. denied*, 379 U.S. 832 (1964); *Ercuson v. United States*, 316 F. 2d 94, 96-97 (8th Cir. 1963); 1 Wigmore, *Evidence* §216 (1940). Hodges' testimony with regard to check kiting was relevant in proving false representations in Republic Casualty's financial condition and was properly admitted by the trial court.

PREJUDICIAL EFFECT OF THE GOVERNMENT CALLING A WITNESS WHO CLAIMED HIS FIFTH AMENDMENT PRIVILEGE

To prove misrepresentation of the true financial condition of Republic Casualty, the Government sought to show that a certificate of deposit held by Republic Casualty and listed on its balance sheet in the face amount of $100,000 was worthless. The certificate of deposit was issued by Home Industrial Bank of Denver, Colorado. Frank A. Blosser was president of that bank and also had a controlling interest in the Capitol City Bank located in the Bahamas, which bank had also issued a certificate of deposit to Republic Casualty.

Blosser was subpoenaed to testify apparently as to the value of the certificates of deposit. This witness indicated

before taking the witness stand that he intended to assert his Fifth Amendment privilege. The court was requested to examine the matter *in camera*, but refused to do so. The court thereupon ordered Blosser to take the stand. The fourth question asked the witness was if he had ever been connected with a bank in Colorado, to which the witness replied the answer might tend to incriminate him. The trial judge then asked if the witness honestly thought he would be incriminated by answering this question. After the witness stated he did on the advice of his attorney, the court decided to explore the question in chambers.

The proceedings in chambers convinced the court that Blosser's claim of Fifth Amendment protection was appropriate. The court then instructed the jury that Blosser's right to take the Fifth Amendment with regard to certain of his activities with the Home Industrial Bank of Colorado was well taken, that Blosser's invocation of the privilege was to protect himself not the defendant, that the jury should not draw any inference against the defendant from Blosser's refusal to testify, and that the jury should consider Blosser a nullity and should forget him.

The Government maintains the trial court properly permitted Blosser to take the stand even after defense counsel's warning that Blosser would plead the Fifth Amendment for there was no indication as to which questions he might choose to answer nor as to which questions he would invoke his Fifth Amendment privilege. It is also asserted that the only practical way of resolving the dilemma was to put Blosser on the stand and ask him questions until he invoked his privilege against self-incrimination. The Government further argues to rule in favor of the position of the defendant would formulate a principle that whenever a witness notifies a trial court in advance that he plans to take the Fifth Amendment when asked to testify,

the court must either automatically excuse him from testifying without determining whether the witness is sincere and unfaltering in his decision or delay the trial by an *in camera* proceeding.

The Supreme Court in the leading case of *Namet* v. *United States*, 373 U.S. 179, 185 (1963), made clear that the issue we are concerned with involves only a claim of evidentiary trial error and does not reach constitutional dimensions. The court found that a witness' assertion of his Fifth Amendment privilege had been held to be reversible error in two instances: (1) "when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" and (2) where "a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination." *Id.* at 186-187. The Court went on to note that reversible error has generally not been found when the episodes were no more than minor lapses through a long trial, as in *United States* v. *Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951), 345 U.S. 942 (1953), or when the trial judge instructed the jury to disregard the witness' refusal to answer. 373 U.S. at 187. *See United States* v. *Aiken*, 373 F.2d 294, 298 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967).

The only question of substance asked Blosser was whether he had ever been connected with a bank in Colorado. This does not amount to a conscious and flagrant attempt by the Government to build its case out of the testimonial privilege. *See United States* v. *Hoffman*, 385 F.2d 501, 505 (7th Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968). Furthermore, there is no direct connection shown between Blosser and Brickey. Thus, Blosser's claim of privilege on the witness stand did not create an inference that Blosser was an accomplice of Brickey's in his fraudu-

lent scheme nor did it create an inference that Brickey was involved in Blosser's machinations. We conclude there was no prosecutorial misconduct and Blosser's refusal to testify did not add critical weight to the Government's case in a form not subject to cross-examination.

The duty of a witness to testify is a vital and necessary part of our adversary trial system. Therefore, a witness cannot refuse to be sworn and must tell what he knows up to the point of his involvement in crime. *Shushan* v. *United States*, 117 F.2d 110, 117 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). As noted in *Marcello* v. *United States*, 196 F.2d 437, 441 (5th Cir. 1952): "The privilege against self-incrimination cannot be asserted in advance of the questions acually propounded in the examination or hearing." *See also Mulloney* v. *United States*, 79 F.2d 566, 580 (1st Cir. 1935), *cert. denied*, 296 U.S. 658 (1935); *In re Schnitzer*, 295 Mich. 736, 295 N.W. 478, 480 (1940).

The defendant has been afforded a fair trial at which he was well represented by adequate counsel. The evidence was sufficient to prove his guilt as charged beyond any reasonable doubt and we find no prejudicial error.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 19714 September Term, 1969

UNITED STATES OF AMERICA *Appellee*

vs.

WILLIAM C. BRICKEY, JR. *Appellant*

Appeal from the United States District Court for the Eastern District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, William C. Brickey, Jr., do surrender himself to the custody of the United States Marshal for the Eastern District of Arkansas, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

April 24, 1970

IN THE UNITED STATES DISTRICT COURT
Eastern District of Arkansas
Western Division

UNITED STATES OF AMERICA ..... *Plaintiff*

vs.

WILLIAM C. BRICKEY, JR. ..... *Defendant*

Memorandum and Order

On September 11, 1968, the federal Grand Jury for the Eastern District of Arkansas, drawn from the body of the District in February of the current year, handed up an indictment containing twenty-four counts charging William C. Brickey, Jr., of Little Rock with mail fraud, 18 U.S.C.A., §1341. The cause is now before the Court on the motion of the defendant to dismiss the indictment or, in the alternative, for a bill of particulars.

The motion attacks the composition of the Grand Jury, alleges prejudice on the part of an individual grand juror, and also attacks the sufficiency of the indictment itself. To the extent that the motion attacked the composition of the grand Jury and alleged prejudice on the part of an individual member thereof, it was the subject of a hearing conducted in open court on November 4. The Government appeared by the United States Attorney. The defendant appeared by his employed counsel, and defendant's right to be present at the hearing was expressly waived by his attorney.

In the course of the hearing the following witnesses testified: Charles F. Cole of Batesville, Arkansas, who was Clerk of this Court from 1960 to a point in 1967; Mrs.

Louise A. Rohan, Chief Deputy Clerk who was Clerk from the time of Mr. Cole's retirement until the time at which the present Clerk assumed his duties; James Simpson who was Jury Commissioner when the names of the grand jurors were placed in the jury box; and the individual grand juror charged to have been affected with prejudice against the defendant. At the conclusion of the hearing counsel were given an opportunity to submit informal memorandum briefs, which briefs have been received and considered.

I.

The Court takes up first the claim of prejudice on the part of an individual grand juror allegedly communicated to his fellows.

The only support in the record for that claim is to be found in an ex parte affidavit attached to defendant's original brief in support of his motion. Affiant stated in effect that he was acquainted with the grand juror; that the latter had expressed to affiant animosity toward the defendant and had stated that "he was going to get Brickey"; that the grand juror is a bookkeeper in the private employ of the United States Marshal for this District; that the grand juror had "requested that he be put on the Grand Jury panel because he knew of the investigation into the affairs of Republic Casualty Company"; and that it was affiant's information and belief that the grand juror "expressed his animosity at some length toward Mr. Brickey and the officers of Republic Casualty Company during the Grand Jury session."

Affiant was not called as a witness at the hearing. The grand juror testified and categorically denied that he

had requested to be put on the jury to "get Brickey" or for any other purpose; he also denied that he had any animosity or prejudice toward Brickey or to Brickey's former insurance company, or that he knew anything about any investigation of Brickey or of the insurance company in advance of the Grand Jury session, or that he had communicated any feeling against Brickey to his fellow grand jurors.

The testimony of the grand juror satisfactorily controverts the affidavit which has been mentioned so that the charge of prejudice falls for lack of proof. Further, even if prejudice on the part of the grand juror had been shown, that would not have been sufficient to justify dismissing the indictment. See Rule 6(b), Federal Rules of Criminal Procedure, 18 U.S.C.A.; *Castle* v. *United States*, 8 Cir., 238 F.2d 131; *United States* v. *Knowles*, D.C. 147 F. Supp. 19; *United States* v. *Belvin*, C.C. Va., 46 Fed. 381; Orfield, "The Federal Grand Jury," 22 F.R.D. 343, 418-421.

II.

The composition of the Grand Jury is attacked on the ground that it did not represent a fair cross section of the population of the Eastern District of Arkansas. The attack may have been prompted by the fact that on September 10, 1968, in the case of *Jewell* v. *Stebbins*, E.D. Ark., 288 F. Supp. 600, this Court held that the Pulaski County, Arkansas, Grand Jury selected to serve during the March 1967 term of the Pulaski County Circuit Court had been selected unconstitutionally in that Negroes had been unconstitutionally excluded from or tokenly included in the membership of Pulaski County grand juries over a long period of time. While the Court did not in that case reach a claim of socio-economic discrimination in the se-

lection of Pulaski County grand jurors, the Court did point out the 14th Amendment requires that State grand and petit jurors represent a fair cross section of the community, and that State juries the selection of which has been characterized by discrimination against socio-economic groups are as unconstitutionally selected as those in connection with the selection of which racial discrimination has been practiced. And the Court stated that if future Pulaski County juries were to avoid or withstand successfully attacks on their composition, the base of selection would have to be broadened substantially.

What the Court had to say in 14th Amendment context in *Jewell* is applicable a fortiori to federal grand and petit juries. When a federal court considers a challenge to the composition of a State jury, its consideration is limited to the question of whether the State in selecting the jury has violated the requirements of the due process or equal protection clause of the 14th Amendment. When a federal jury is involved, the question is whether its selection and consist will pass muster with the Supreme Court of the United States in the exercise of its supervisory jurisdiction over the administration of justice in the federal courts. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225; *McNabb* v. *United States*, 318 U.S. 332, 340; see also *Ballard* v. *United States*, 329 U.S. 187.

While the Constitution and federal standards of jury selection prohibit the exclusion of groups of persons from jury service on the basis of race, sex, religion, occupation, or economic or social status, neither the Constitution nor those standards require proportional representation of groups, nor is illegality in jury selection shown merely because of the fact that a particular grand or petit jury may fail to be fairly cross sectional. *Swain* v. *Alabama*, 380 U.S. 202; *Thiel* v. *Southern Pacific Co.*, supra; *Rabinowitz*

v. *United States*, 5 *Cir.*, 366 F.2d 34, 59. As stated in *Rabinowitz*, supra, "The focus of the law is on the list from which the jury is drawn and not on the composition of a particular jury or grand jury."

Where, as here, a defendant challenges the selection of a federal grand jury, the burden is upon him to establish the validity of his challenge by evidence at least to the point of making a prima facie case; he is not aided at the outset by any presumption of illegality or irregularity in the selection of the jury challenged by him. And in the Court's estimation defendant has failed to discharge that burden of proof.

Unlike the State grand jury involved in *Jewell* v. *Stebbins*, supra, the members of which were selected as individuals to serve on that particular grand jury, the names of the members of the Grand Jury with which the Court is concerned here were drawn completely at random from the jury box containing the names of all potential grand jurors.

The testimony of the witnesses who have been mentioned and who were concerned with the filling of the box was to the effect that names were sent in to them from over the District by various "key men." The "key man" method of selecting federal jurors has been approved regularly in the past so long as the "key men" have not employed discriminatory methods in furnishing names to be put into the box. While that method is now in the process of being supplanted by the random selection method prescribed by the Jury Selection And Service Act of 1968, P.L. 90-274, 82 Stat. 53, it was a valid method when the names of the grand jurors drawn in February of this year were placed in the box, when their names were drawn from the box, and during their sessions as a Grand Jury.

Assuming for purposes of argument that this particular Grand Jury did not represent a fair cross section of the population of the District, it does not follow that the totality of names in the box did not and does not represent such a cross section, and there is no evidence which would impel or justify such a conclusion. There is nothing of record to indicate that the Clerk or the Jury Commissioner or any of the "key men" was guilty of any discriminatory or illegal practice or that, taken as a whole, the names placed in the box did not fairly cover the spectrum of the District's population from the standpoints of race, sex, age, geography, occupation, and the like. The "key men" were requested to submit the names of persons whose "experience, education and integrity" qualified them for jury service. As indicated in *Jewell*, such persons can be found in all walks of life, and it is not to be presumed that the "key men" did not look to all walks of life in choosing the persons whose names they submitted.

III.

The attack on the indictment as a charging document may be viewed at the same time as an attack on the indictment as a whole and as an attack on specific counts. As to the first aspect just mentioned, it is evident that if any of the counts is good, the attack on the indictment as a whole must fail, even if certain particular counts are bad.

Defendant's alleged scheme and artifice to defraud are set out in some detail in the first count, and that count also contains a charge of a single specific mail use. Each of the remaining 23 counts incorporates by reference the description of the alleged fraudulent scheme appearing in the first count, and each of the later counts also charges a specific mail use.

The first count charges in substance that during the alleged fraud period extending from September 1963 to March 13, 1967, the defendant was president and chairman of the board of directors of Republic Casualty Co., an Arkansas insurance company, the principal business of which was the sale of automobile insurance largely to members of the Armed Forces of the United States; it is further charged that during the period just mentioned defendant devised a scheme and artifice to defraud Republic, its agents, insureds, policyholders, stockholders, and other persons to the Grand Jurors unknown. Basically, the alleged scheme or artifice was that the defendant by various means would divert to himself the money and assets of Republic, and it is alleged that on or about January 11, 1968 (sic) at Little Rock, Arkansas, the defendant "for the purpose of executing the aforesaid scheme and artifice to defraud, did willfully and knowingly cause to be delivered by the United States Post Office Department a letter containing Republic Casualty Company check No. 3020, dated January 8, 1965, payable to William C. Brickey, Jr., in the sum of $75,000.00 to Worthen Bank and Trust Co., Little Rock, Arkansas, from Central National Bank in Chicago, Illinois . . ."

The second count refers to another check in the sum of $35,000, dated January 7, 1965, which was delivered on or about March 1, 1965, to Worthen Bank & Trust Co. and which was mailed by the Mercantile-Safe Deposit and Trust Company of Baltimore, Maryland. That check is alleged to have been drawn on an account of Republic Casualty Co.

It will be observed that the offense is alleged to have been committed on "January 11, 1968," whereas the check mentioned in Count I is alleged to have been dated "January 8, 1965." Since the alleged fraud period ended in March 1967, it is obvious that the reference to "1968" is a typographical error and that "1965" was intended. The Court does not think that that error, which is obvious, tends to the substantial prejudice of the defendant.

and to have been payable to Leonhart and Company, Inc. Counts XIX-XXIV allege that in the execution of the alleged scheme the defendant caused delivery by mail of certain letters from Republic to certain insurance agencies through which Republic's insurance was sold. With regard to those counts it might be pointed out that Count I alleges, among other things, that it was part of the scheme that the defendant would divert to himself monies owing by the agencies to the company.

While the Court thinks that the defendant is entitled to a bill of particulars with respect to those counts, the Court is satisfied that they state public offenses and are sufficient for indictment purposes.

Counts III through XVIII, with one exception, do not allege mail uses directly involving either defendant or Republic. Rather, the mail uses charged in those counts involve, with the one exception, routine business transactions between the independent insurance agencies and insureds or prospective insureds. And the exception, appearing as Count III, involves a routine request from Republic to a policy holder for the submission of a "Request for Claimant's Report."

Those counts give the Court some trouble. While Count I alleges in general terms that defendant intended to defraud policy holders as well as Republic itself, it is not at all clear to the Court that that general allegation is borne out by other allegations appearing in Count I. In legal contemplation defendant's alleged scheme may not have reached beyond his corporate principal, although naturally any scheme seriously to defraud an insurance company may have an adverse effect on policy holders and is almost certain to do so if the fraudulent scheme results in the insolvency of the company. However, those effects

may be considered as collateral, and if defendant's scheme was merely to defraud the company, the mail uses alleged in the courts now under consideration may be too peripheral to constitute violations of the mail fraud statute. Cf. *Parr v. United States*, 363 U.S. 370.

However, since the indictment as a whole will not in any event be dismissed, the Court finds it both unnecessary and undesirable to decide at this time the question posed in the preceding paragraph, and ruling on the motion as to Counts III through XVIII will be reserved at least until the Court has studied the bill of particulars which the Government will be required to file.

IV.

The Court is of the opinion that the Government should file a full bill of particulars within the next two weeks going to all counts of the indictment.

With regard to Count I and Count II, the Government will be required to state in the bill of particulars the parts that the checks referred to in those counts played in the defendant's alleged scheme and artifice to defraud, and how the mailing of those checks was in execution or attempted execution of said alleged scheme and artifice.

In connection with the last six counts of the indictment the Government will be required to describe and state the substance of the letters mentioned in those counts, to state the parts played by those letters in the alleged scheme and artifice to defraud, and to state how the mailing of those letters was in execution or attempted execution of the scheme.

Turning now to Counts III through XVIII, the Government will be required to state as definitely and fully as possible the basis for its contention that the defendant planned to defraud policy holders, as contrasted to Republic Casualty Co., the manner in which the policy holders were to be defrauded, the extent, if any, to which Republic Casualty Co. had direct dealings with policy holders, and the extent, if any, to which Republic Casualty Co. through direct mail or other types of advertising or otherwise represented to policy holders or prospective policy holders that it was a solvent and reliable company. The Government will also be required to state what it contends with respect to the defendant's control over the affairs of Republic Casualty Co. and with respect to his motives and intents when he first acquired control of the company, if he did so.

It is, accordingly, ORDERED that the motion of the defendant herein is denied to the extent to which it seeks a dismissal of the indictment as a whole and to the extent to which it seeks a dismissal of Counts I and II and Counts XIX-XXIV in particular. Ruling on the motion as applied to Counts III through XVII is reserved. The Government will file a bill of particulars in compliance with the Court's memorandum not later than two weeks from this date.

Dated this 15th day of November, 1968.

/s/ J. Smith Henley
United States District Judge

ARKANSAS GAZETTE

Voiding Asked Of Indictment On Jury Lineup

By JEROL GARRISON
Of the Gazette Staff

A motion was filed Tuesday in federal District Court seeking to have a mail fraud indictment against William C. Brikey Jr. of Little Rock dismissed on the ground that the federal Grand Jury for the Eastern District of Arkansas was unconstitutional.

H. Clay Robinson of Little Rock, Brickey's attorney, contended that the Grand Jury "does not represent a cross-section in age, economic status, social level, etc., of the area which it represents." He alleged that this renders the Grand Jury illegal and the indictment invalid.

Robinson said the Grand Jury was "very similar" in its composition to the Pulaski County Grand Jury which federal Judge J. Smith Henley ruled September 10 was unconstitutional. Judge Henley said the Pulaski Grand Jury "by no means represents a cross-section" of the County. He said the economic and social base of future Grand Juries should be "broadened substantially" and that more Negroes should be included.

Robinson also alleged that one member of the federal Grand Jury, Harold Coggins of England, an accountant, was prejudiced against Brickey and should not have been allowed to serve on the Grand Jury. He contended that Coggins prejudiced the other Grand Jurors against Brickey.

Affidavit Attached To the Motion

Noah Peek of England said in an affidavit attached to the motion that "Mr. Coggins had expressed to me his animosity toward ... Brickey and had stated that he was going to get Brickey." Peek said that Coggins was a bookkeeper for Pat Henderson, an England ginner and planter who is United States marshal for the Eastern District of Arkansas. Peek was not further identified.

Brickey, 49, former president and chairman of the Board of the Republic Casualty Company of Little Rock, was indicted September 11 on 24 counts of mail fraud. The indictment alleged that Brickey defrauded Republic Casualty of "large sums of money" and that he used the mails to do this.

Republic Casualty sold mail order automobile insurance to servicemen over the nation. It was declared insolvent in Pulaski Circuit Court in March 1967 on a petition filed by the state insurance commissioner. It now is in receivership.

Last Jury Chosen Before New System

The 20-member federal Grand Jury being challenged is the last one to be chosen before a new random selection plan goes into effect December 23 for all federal petit jurors and Grand Jurors. The jurors were chosen last February by the court clerk and jury commissioner. They placed more than 300 names of persons they thought would make good jurors into a box and then drew out names alternately.

Mrs. Louis A. Rohan of Little Rock was the court clerk at that time, although many of the names in the box had been placed there by the prior clerk, Charles F. Cole of Batesville, who retired last year. The jury commissioner was J. D. Simpson Jr., a Little Rock businessman.

Federal law requires that at least 300 names be in the box before names are drawn. Usually there are several hundred more than that in the box. This system will be replaced December 23 by a selection of jurors at random from voter registration lists. W. H. (Pete) McClellan of Little Rock, the court clerk, has already taken steps to place the new system into operation.

Grand Jury Met In Two Sessions

The Grand Jury met in two sessions, one last February and one in September. It returned 47 indictments at the September session, which lasted three days.

William H. Fox of Pine Bluff, a partner in the W. S. Fox and Sons lumber company, was the jury foreman, and Charles D. Maynard of Little Rock, industrial development manager for Arkansas Louisiana Gas Company, was the deputy foreman. Maynard is a retired Army colonel.

Fox is 48 and Maynard is 49.

Other members of the Grand Jury and their ages and occupations as listed on forms they filled out:

James R. Barnett, 33, of Heber Springs, a retail merchant; W. R. Benton Jr., 56, of Fordyce, a banker; Charles D. Calkins Jr., 42, a clerk for Arkansas Power and Light Company; Coggins, 56; Charles H. Dante, 35, of Dumas, a farmer and ginner; M. Herschel Davis, 68, of Little Rock, a "dealer of bagging and ties"; Harold Engstrom, 50, of Little Rock, an engineer and sales manager for Arkansas Foundry Company; William C. Erfurth, 69, of Little Rock, a retired salesman; G. Adrian Fike, 54, of Batesville, manager of a Sterling department store; Enoch Fisher, 71, of Litle Rock, a retired custodian; A. Nils Florentz, 62, of Little Rock, vice president and secretary of Union Life Insurance Company; Mrs. Frances Gammill, 46, of Little Rock, executive director of the Pulaski County Tuberculosis Association; Frank Guyot, 54, of Cabot, a real estate broker; Willie D. Harper, 47, of Little Rock, principal of Dunbar Junior High School; Arnold L. Mayersohn, 4, of Little Rock, a merchant; E. T. Hornor Jr., 50, of Helena, an automobile dealer; Lowell L. White, 54, of Benton, employe relations administrator for the Aluminum Company of America plant at Bauxite, and Leonard D. Wilson, 45, of Walnut Ridge, a wire chief for Southwestern Bell Telephone Company.

Some Unable to Attend Meeting in September

Persons on the Grand Jury who were unable to attend the September meeting were Chauncey L. Denton Jr., 52, of Tyronza, a farmer and ginner; Mrs. Waldo Tiller, 13, of Little Rock, a housewife, and Tom Brewer, 62, of Beebe, an insurance man.

Two or three of the Grand Jurors are Negroes.

In his ruling on the Pulaski County Grand Jury, Judge Henley said: "There is not a woman on it, nor a person under 50 years of age, nor a day laborer, nor a mechanic, nor a farmer." One of the 16 jurors was a Negro.

Judge Henley has been handling the Brickey case, so Robinson's motion will be heard by him. Robinson was a deputy prosecuting attorney for Pulaski County until August 31 when he resigned to go into full-time private law practice.

Arkansas Gazette.

Published daily and Sunday by Gazette Publishing Company, 112 West Third, Little Rock, Arkansas 72203. Second Class Postage paid at Little Rock, Arkansas.

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cation rights of all other matters herein are also reserved.

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 363

WILLIAM C. BRICKEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1970. A petition for rehearing was denied on May 25, 1970. MR. JUSTICE BLACKMUN extended the time for filing a petition for a writ of certiorari to July 6, 1970, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

400-477—70

QUESTIONS PRESENTED

1. Whether the grand jury was properly selected.

2. Whether evidence of use of the mails was sufficient to sustain petitioner's conviction under the mail fraud statute, 18 U.S.C. 1341.

3. Whether the trial court properly permitted a witness to take the stand when it had prior knowledge that he might plead the Fifth Amendment privilege against self-incrimination.

4. Whether testimony relating to petitioner's personal expenditures was properly admitted.

5. Whether the omission of certain charts from the record on appeal constituted a denial of appellate review.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on two counts of mail fraud in violation of 18 U.S.C. 1341.[1] On March 24, 1969, he was sentenced to four years' imprisonment. The court of appeals affirmed.

The evidence disclosed that, in 1963, petitioner became President and Chairman of the Board of an insurance company in Arkansas, called Republic (Tr. 18). From then until March 13, 1967, when Republic went into receivership, the company was insolvent (Tr. 32; 53–54; 744a. However, the annual financial statements for the years 1963–1965, certified by petitioner and submitted to the State Insurance Department,

[1] Petitioner was originally indicted on 24 counts of mail fraud. However, 22 of these were dismissed prior to trial. *United States* v. *Brickey*, 296 F. Supp. 742.

indicated a surplus of assets over liabilities (Tr. 19–29).[2] To effect this apparent surplus, petitioner caused Republic to purchase and list as assets several items which had nominally large face values but were in fact worthless. Among them were two certificates of deposit issued by banks in Colorado and the Bahamas, which were controlled by Mr. Frank Blosser (Tr. 345, 400, 415, 427–428, 641). At the time the statements were prepared, both banks were insolvent (Tr. 418, 423, 681–682, 690–691).

In January 1965, petitioner purchased a controlling interest in another insurance company, United Benefit (Tr. 537–538). It was purchased with two cashier's checks of the Central National Bank of Chicago, one for $75,000, the other for $35,000 (Tr. 538–539). The $75,000 check was bought with a check for the same amount drawn on the Republic account in the Worthen National Bank of Little Rock, Arkansas. This check was sent from Chicago to Little Rock through the mails and cleared prior to purchase of the cashier's check (Tr. 540, 562, 650–655). The $35,000 check was purchased with a check payable to petitioner and Republic drawn on the account of Leonhart and Company at the Mercantile Safe Deposit and Trust Company of Baltimore (Tr. 540–541). This was a loan to petitioner secured by a $35,000 check drawn on the Republic account with the Worthen Bank and his personal note (Tr. 547–548). The Republic check was

[2] The annual statement for 1966 was not submitted since receivership proceedings were instituted before it was due to be filed (Tr. 15). A working copy of this statement, admitted at trial, revealed similar overstatements (Tr. 16, 41).

deposited on February 1, 1965 in the Mercantile Trust Company (Tr. 548–550), and sent through the mails to the Worthen Bank where it eventually cleared (Tr. 550–555; 562; 650–655).

Petitioner also used Republic funds, directly or indirectly through a wholly-owned holding company, General Leasing Corporation (Tr. 152–154, 523–525), to pay for reinsurance of United Benefit (Tr. 519, 523–525) and to buy jewelry (Tr. 614–621), a swimming pool (Tr. 633–634) and other personal items. As evidence regarding personal expenditures was introduced, the Court admonished the jury to consider it only insofar as it revealed petitioner's scheme to draw funds from Republic for his own use (Tr. 622).

ARGUMENT

1. Petitioner's motion to dismiss the indictment on the ground that the grand jury was improperly drawn was correctly denied prior to trial.[3] The grand jury list was selected using the key man system;[4] questionnaires had been sent to representatives of the 42 counties comprising the Eastern District of Arkansas to obtain the names of qualified persons (R. 20). The guidelines recommended by the Judicial Conference of the United States were used in making the final selection (R. 25).

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[3] We are lodging a copy of the transcript of the hearing on the motion with the Clerk of this Court. "R" refers to this transcript.

[4] Petitioner's suggestion that the key man system is unconstitutional per se is without merit. See *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), *Mobley* v. *United States*, 379 F. 2d 768 (C.A. 5).

There is no evidence of systematic exclusion or limitation of an identifiable group from the jury list. *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), and *Henslee* v. *Stewart*, 311 F. 2d 691 (C.A. 8), certiorari denied, 373 U.S. 902, upon which petitioner relies, are therefore inapposite. Nor is there any indication that improper standards were used in the final selection. Absent such evidence, petitioner fails to overcome the presumption that the list represented a fair cross-section of the community. *Swain* v. *Alabama*, 380 U.S. 202; *Hoyt* v. *Florida*, 368 U.S. 57; *Sanders* v. *United States*, 415 F. 2d 621 (C.A. 5).

2. The fact that checks used by petitioner in his purchase of controlling stock in United Benefit were sent through the mail in order to be cleared for collection was sufficient to prove use of the mails under the mail fraud statute.

Count I of the indictment alleged that petitioner issued a $75,000 check drawn on the Republic account at the Worthen Bank in Arkansas in order to purchase stock in United Benefit as part of his plan to deplete Republic's assets. Petitioner's attorney testified that, to obtain a cashier's check from the Central Bank in Chicago for the purchase, he submitted the Republic check for collection. Only after the check had cleared was the attorney able to get the cashier's check. An officer of the Arkansas bank testified that the check could only have arrived for clearing by use of the mails (Tr. 650).

Count II dealt with a $35,000 check used in the transaction. In order to obtain these funds, petitioner

procured a $35,000 loan from Leonhart and Company of Baltimore, Maryland. In exchange for this loan, petitioner gave Leonhart a $35,000 check drawn on the Republic account in Arkansas, secured by petitioner's personal note. The Republic check was later deposited in a Baltimore bank, and was mailed to Arkansas for clearing. When the check cleared, petitioner's liability on the note was extinguished.

In both instances the clearing process, through use of the mails, was necessary to complete petitioner's fraudulent scheme. *Pereira* v. *United States*, 347 U.S. 1.

3. The trial judge's handling of witness Blosser, who asserted his Fifth Amendment privilege against self-incrimination, was not prejudicial error. Blosser was called in connection with two certificates of deposit having a face value of $100,000 each which were listed by petitioner in Republic's financial statements. Blosser was president of the issuing banks. Before the witness could be sworn, counsel for petitioner informed the court that he intended to plead his Fifth Amendment privilege and requested an examination in chambers, but the court permitted the witness to take the stand immediately. After three questions, the witness was asked his relationship with one of the banks. He refused to answer, claiming the privilege (Tr. 369). The trial judge then retired to chambers where he determined the claim to be well-founded. Upon returning to the courtroom, the judge

admonished the jury to disregard Blosser entirely and to draw no inference against petitioner from his refusal to testify (Tr. 372–373).

It would have been error if the prosecution made a flagrant and conscious attempt to build its case on inferences drawn from the refusal of the witness to testify or if the refusal to testify added critical weight to the prosecution's case in a form not subject to cross-examination. *Namet* v. *United States*, 373 U.S. 179, 186–187. In this case, however, the questioning ended when Blosser invoked the privilege. The prosecutor made no later reference to the refusal and no effort to connect Blosser's alleged criminal acts with petitioner. The trial judge properly directed the jury not to consider the witness's refusal to testify. The incident was a minor one during the course of a lengthy trial in which 33 witnesses were called. See *United States* v. *Hoffman*, 385 F. 2d 501 (C.A. 7), certiorari denied, 390 U.S. 1031; *United States* v. *Harmon*, 339 F. 2d 354 (C.A. 6), certiorari denied, 380 U.S. 944.

4. Testimony concerning specific personal expenditures by petitioner with Republic money was properly admitted as part of the proof of the extent of fraud. In each instance, a check drawn on the account of Republic or General Leasing was used. Other evidence indicated that Republic funds had been diverted into the General Leasing account.

Petitioner complains of the fact that this evidence was admitted despite petitioner's stipulation that

funds from both companies were used for his own expenses (Tr. 612, 621–623). He contends that the evidence was therefore irrelevant and, even if relevant, so prejudicial that only his stipulation that the funds were for personal use should have been admitted. The judge instructed the jury that the evidence of personal use of the funds was material to show the manner by which petitioner diverted funds from Republic and that the particular use made was of no concern (Tr. 621–623). It was within the court's discretion to permit the government to present its evidence rather than accept petitioner's stipulation. *Scales* v. *United States*, 367 U.S. 203; *United States* v. *Pollack*, 417 F. 2d 240 (C.A. 5), certiorari denied, 397 U.S. 917, rehearing denied, 397 U.S. 1030.

5. Petitioner's appeal was not prejudiced by the fact that illustrative charts which had been employed by a government auditor in explaining the complex financial aspects of petitioner's scheme to defraud Republic were not made part of the appellate record. The responsibility for inclusion of the charts rested with petitioner. The appellate court was not hampered in considering petitioner's contentions in any event. The testimony of the witness made it clear that the charts had been prepared solely from company ledgers, deposit slips and other financial documents in evidence. He described each chart in detail (Tr. 664–745). Since the court of appeals had before it a complete picture of both the nature and the contents

of the charts, it was not necessary to view them physically in order to meet petitioner's claim.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD G. SCHERAGA,
Attorneys.

AUGUST 1970.

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[5] At trial, petitioner did not question the accuracy of the charts. Indeed, he raised only one objection to them, the characterization of a certificate of deposit as "worthless." This objection was sustained (Tr. 708–709). Moreover, the court instructed the jury that the charts carried no probative weight but were being employed merely to illustrate the witness's testimony (Tr. 746–747). The trial judge properly allowed their use. *United States* v. *Pollack*, *supra*; *United States* v. *Goldberg*, 401 F. 2d 644 (C.A. 2), certiorari denied, 393 U.S. 1099; *McDaniel* v. *United States*, 343 F. 2d 785 (C.A. 5), certiorari denied, 382 U.S. 826.

U.S. GOVERNMENT PRINTING OFFICE: 1970